F. M. S. REPORTS

[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

July 9, 1938.

RE LIM HEE KUNG.
EX PARTE ARTHUR OAKLEY COLTMAN.

[SELANGOR BANKRUPTCY No. 13 of 1936]

Bankruptcy — distribution of bankrupt's property—landlord's claim for rent—charges for electricity and water supplies—priorities—Bankruptcy Enactment (Cap. 55) Ss. 38, 40, 41, 44 (1) Sanitary Board Enactment (Cap. 137) Ss. 12, 14, Government Suits Enactment (Cap. 117) S.32.

A landlord's distress by seizure is not an execution within Section 44 (1) of the Bankruptcy Enactment and the Official Assignee has no right to possession of property seized under the distress. The landlord's claim is therefore entitled to priority over other claims within the limits set out in Section 40 of the Enactment. When a landlord proves in the bankruptcy for any surplus due for which the distress may not have been available he proves as an ordinary creditor.

Claims for sums due in respect of electricity and water supplies are not entitled to any priority in the distribution of the property of a bankrupt under Section 38 of the Enactment.

MOTION.

M. C. Hay, Deputy Legal Adviser, for Chairman, Sanitary Board, Kuala Lumpur.

R. Ramani, for the landlords.

K. R. Blackwell, Official Assignee (Applicant) in person.

CUSSEN, J.—This is an application to the Court by the Official Assignee under section 78 (iii) of the Bankruptcy Enactment (Cap. 55) for directions in relation to certain matters arising under the bankruptcy of one Lim Hee Kung.

The relevant facts are set out in the following paragraphs of the affidavit of the Official Assignee:—

"2. On 6.11.36, an Interim Receiving order was made on the petition of Mr. Coltman, architect, against the above-named bankrupt, Lim Hee Kung, who was the proprietor of the Prince's Grill and Cabaret situated at Nos. 7-9 and No. 19 Kandang Kerbau Road, Kuala Lumpur.

3. On the same day as aforesaid and prior to the making of the aforesaid interim receiving order, the landlord of the aforesaid Nos. 7-9 and 19, Kandang Kerbau Road distrained for rent due, $2,517.50 seizing certain goods and effects and the Official Assignee took possession of the said goods and effects under section 44 (Cap. 55), treating the distress warrant as an execution.

"4. On 9.11.36 on the application of the Chairman, Sanitary Board, Kuala Lumpur, the Magistrate issued a Warrant for Electricity and Water charges under section 44 of (Cap. 201) and section 17 (Cap. 203). The warrant was not executed but simply handed to the Chief Clerk of the Official Assignee's Office.

5. On 8.1.37, an adjudication order was made against the bankrupt.

6. The goods and effects distrained by the landlord were subsequently sold and realised a a net sum of $1,706.89. From book debts etc. a gross sum of $801.39 has been received but the Official Assignee's expenses and the Petitioning Creditor's taxed Bill of Costs absorb $670.11 of this sum, leaving only $131.28 for the part payment of priority debts to labourers.

7. To the intention of the Official Assignee to give priority under section 40 (Cap. 55) to the landlord to the extent of $1,706.89 and to treat him as an ordinary creditor for the balance of his claim, the Chairman Sanitary Board has objected and he maintains that his claim of $526.68 should be given priority over the landlord by virtue of section 32 of the Government Suits Enactment Cap. 17.

10. By virtue of section 78 (iii) Bankruptcy Enactment (Cap. 55), I desire to seek directions of the Honourable Court on the following questions to enable me to dispose of the funds now under my charge:—

(i) Has the landlord in this case the first priority in payment as a secured creditor to the extent of the nett proceeds of sale of the goods and effects distrained by him?

(ii) Has the Sanitary Board any right in this case to priority over the landlord or over any other creditor?"

The first question appears to be this—Does section 44 of the Bankruptcy Enactment empower the Official Assignee to require delivery of and possession of property seized under a Warrant of Distress for rent?

Section 44 (i) reads as follows:—

> "Where any property of a debtor is taken in execution and before the sale or realisation thereof, or the delivery to the execution creditor of any moneys seized or paid in order to avoid sale, notice is served on the Court out of which such execution has issued that a receiving order has been made against the debtor such Court shall deliver the property or the possession thereof and any such moneys to the Official Assignee but the costs of and incidental to the execution shall be a first charge on such property or moneys and the Official Assignee may sell the

property or an adequate part thereof for the purpose of satisfying the charge."

Is a landlord's distress by seizure under a warrant execution by a creditor within the meaning of section 44 (i)?

In my opinion it is not; execution in the meaning of the section means execution under the provisions of Chapter XXIV of the Civil Procedure Code, i.e. execution of decrees by the judgment-creditor or decree-holder.

It is interesting to note that in the Indian Insolvency Acts the words used in the corresponding section are "Where execution of a Decree has issued....."

In the case of distress for rent there is no decree within the meaning of the definition of "Decree" in section 2 of the Civil Procedure Code.

It followed, therefore, in my view, that the landlord's distress for rent lies outside the scope of section 44 (i) of the Bankruptcy Enactment and that the Official Assignee has no right to possession of property seized under a warrant of distress.

That this is so is clearly evident from the provisions of section 40 of the Enactment which preserves the landlord's right to distrain both before and after the commencement of the bankruptcy.

The property of the bankrupt available for distribution in bankruptcy includes only the surplus, if any, after the distraint for rent has been satisfied.

Next to be considered is the effect of the warrants issued under section 44 (Cap. 201) and section 17 (Cap. 203).

The two sections are alike and provide a summary procedure by attachment and sale for the recovery of sums due in respect of supplies of electricity and water.

Here again the question arises—Is such attachment and sale under warrant execution within the meaning of sections 43 and 44 of the Bankruptcy Enactment?

In my opinion it is not; the operation of the sections appear to be confined to the execution of decrees.

Section 43 (ii) speaks of "the judgment in execution of which the attachment was made."

Section 44 (ii) speaks of "an order of execution in respect of a decree for a sum....."

If this is correct then where an attachment has been made under warrant issued under either the Electricity or the Waters Supply Enactments before the making of a Receiving Order the process for recovery is unaffected by sections 43 and 44 of the Bankruptcy Enactment and the property attached may be sold and the proceeds applied to the discharge of the debts. But this remedy for the recovery of sums due under the Electricity and Water Supply Enactments no longer exists once a Receiving Order is made. That is clearly the effect of section 9 of the Bankruptcy Enactment which provides that on the making of a Receiving Order no creditor shall have any remedy against the person or property of the debtor except as directed by the Enactment. So the only remedy available in respect of such debts is to prove for them in the bankruptcy.

This disposes of the first question on which the Official Assignee is seeking the direction of the Court.

The landlord is entitled to the proceeds of sale of the goods distrained in satisfaction of his claim for rent within the limits set out in section 40 of the Enactment, which depends upon the date of the commencement of the bankruptcy, as determined by section 41 of the Enactment.

When a landlord proves in the bankruptcy for any surplus due for which the distress may not have been available he of course proves as an ordinary creditor and has no priority.

The second question set before me is whether such claims as these for sums due in respect of electricity and water supplies are entitled to any priority in the distribution of the property of a bankrupt under section 38 of the Enactment?

On the section itself such debts are given no priority, not being sums of money due in respect of rates or taxes.

The only priorities provided for in the section are those for wages of clerks, servants, labourers or workmen; and rates and taxes.

Reliance is placed upon two arguments; first upon section 32 of the Government Suits Enactment (Cap. 17) and secondly upon the effect of the Civil Law Enactment 1937.

It has been suggested that sums due for supplies under these Enactments are not debts due to Government; but, in my opinion that is clearly not correct.

This supply is given from a "Government Public Installation" and that is defined in section 2 of the Electricity Enactment as "a 'Government installation' operated by or on behalf of the Government for the supply of energy to the public" and "Government installation" is defined as an "installation the property of or operated by the Government."

It is, in my view, also quite clear that sums due in respect of water supplied under the pro-

visions of the Water Supply Enactment (Cap. 203) are debts due to Government.

Sections 12 and 14 of the Sanitary Board Enactment (Cap. 137) are, I think, relevant to this matter. They read:—

> "12. All monies received by a Board by virtue of this or any other *Enactment* shall be paid into the Treasury to the credit of the public revenue.
> 14 (ii) The Chairman shall exercise on behalf of the Government of the State the powers conferred upon him by this Enactment."

Section 32 of the Government Suits Enactment (Cap. 17) provides that all debts due to Government "shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person (i.e. the person indebted to Government) to any other person whomsoever."

This enactment was passed in 1928 but an exactly similar priority was given to Government debts by the State Enactments intituled "The Government Debts Priority Enactment 1904."

It is to be noted that the priority here given is only as against subsequent debts.

The question for consideration is whether this provision affects and must be read into section 38 of the Bankruptcy Enactment.

It is evident that the provisions of section 32 of Cap. 17 are inconsistent with those of section 38 of Cap. 55, and especially so with section 38 (i) (a) (b).

It is evident that the application of section 32 would, in the case of a Government debt which accrued due four months before the date of the Receiving Order, destroy the priority given by section 38 (i) (a) (b) to the wages and salary of clerks, servants, and workmen.

Now the general rule of construction is that where the provisions of sections of different enactments are inconsistent and contradictory the later enactment controls the earlier, the provisions of which must be held to be repealed or amended so far as is necessary to give effect to the later law.

The application of that rule would mean that section 32 of Government Suits Enactment 1928 should be held to control the operation of section 38 of the Bankruptcy Enactment—which is a 1912 Enactment.

But the Bankruptcy Enactment is entitled "An Enactment to make provision for proceedings in Bankruptcy."

Until the enactment of Cap. 17 in 1928 the Bankruptcy Enactment, being later in date, would, applying the same rule of construction, prevail over the earlier 1904 enactments (the Government Debts Priority Enactment).

However the Government Suits Enactment 1928 is entitled "An Enactment to declare and consolidate the law relating to Government Suits"; it does not amend the law and, as I have already noted, the provisions of section 32 are identical with those of the 1904 enactments.

Section 38 of the Bankruptcy Enactment is a special law, which is clearly intended to be a complete and exhaustive rule for the distribution of the assets of bankrupt. If it were intended that the general priority for Government debts created by the 1904 enactment or any other priority would apply in bankruptcy it would have been so expressly provided for in the Bankruptcy Enactment.

I am therefore of opinion that section 38 of the Bankruptcy Enactment is not affected by section 32 of the Government Suits Enactment.

Consideration of the law relating to insolvency before the present Bankruptcy Enactment confirms the view I have expressed.

The Bankruptcy Enactment was passed in 1912 but not brought into force until 1921.

Section 1(ii) provides that on the coming into force of the Enactment Chapter XX of the Civil Procedure Code 1902 shall be repealed. That Chapter XX was re-enacted in the 1918 Civil Procedure Code in which it is Chapter XXIII (Veules Edition of the Laws, Vol. III. page 419: not in the Gibson Edition which is subsequent to the coming into force of the Bankruptcy Enactment).

That chapter is entitled "Insolvent Judgment-Debtors" and provides that a judgment debtor, either on his own application or on that of a creditor, may be declared insolvent. A receiver is appointed who collects and distributes the assets.

Section 344(i) provides for priority for certain classes of debts. The section reads:—

> "The receiver shall proceed under the direction of the court.
> (a) to convert into money the insolvent's property vested in the receiver as aforesaid;
> (b) to pay thereout debts, fines, and penalties (if any) due by the insolvent to the Government;
> (c) to pay the decree-holder's costs, where the declaration of insolvency has been made on the application of a decree-holder;
> (d) to discharge, according to their respective priorities, all debts secured by

mortgage of, or charge or lien on, the insolvent's property;

(e) to pay the wages of labourers (if any) in accordance with the provisions of Chapter XI of "The Labour Code, 1912";

(f) to pay all wages or salary of every clerk, servant, labourer, or workman, other than labourers referred to in clause (e), not exceeding two hundred dollars, in respect of services rendered to the insolvent during three months before the date of the declaration of insolvency;

(g) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts and without any preference."

This gives priority to all Government claims of whatever nature.

But the Bankruptcy Enactment expressly repeals this provision and in its stead we find the rule of priority of debts as set out in section 38 in which priority is given only to sums of money due in respect of rates or taxes for the current year.

This means that the Legislature have deliberately and intentionally cut down the priority right of Government.

The Bankruptcy Enactment is based upon the English Acts and the priority given to Government in section 38 of our Enactment is the same as that given to the Crown in section 33 of the English Acts.

There was no need to insert in the local Enactment a section similar to section 151 of the English Act because there did not exist any Common Law priority for Government debts such as appears to have existed in England for Crown debts.

As I have remarked I do not consider the re-enacting, in section 32 of the Government Suits Enactment 1928, of the provisions of the Government Debts Priority Enactment 1904 in any way affects the operation of section 38 of the Bankruptcy Enactment. The partial preference of payment there given does not apply to distribution in bankruptcy.

It was submitted in argument by the Deputy Legal Adviser (Mr. Hay) that since the enactment of the Civil Law Enactment 1937 there arose, by virtue of section 2 thereof, a Common Law right of priority in respect of Crown debts and that by virtue of such a Crown debt took priority over even a landlord's right of distress for rent.

I am quite prepared to agree that in this country a debt due to Government is the same thing as a Crown debt, but this argument is, I think, disposed of by pointing out that the rights and priorities of Government debts of various kinds have been laid down by express enactment, generally in section 32 of the Government Suits Enactment and, as regards particular kinds of debts, in other enactments and that, therefore, the Common Law of England is excluded by the opening proviso of section 2 of the Civil Law Enactment, i.e.—

"2(i) Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States the Common Law of England.....shall be in force in the Federated Malay States....."

It must be pointed out that under the British Bankruptcy Acts the provisions of the Acts relating to priorities of debts are, by section 151, made binding on the Crown, and, by section 33 (the priority section), no general priority is given to Crown debts; the only priority given being in respect of rates and taxes for twelve months, i.e. similar to the priority given by section 38(i)(c) of our Enactment, so that in England whatever Common Law priority existed in favour of Crown debts was destroyed as regards bankruptcy by section 151 of the Bankruptcy Act. Consequently since section 2 of the Civil Law Enactment only imports into our law "the common law of England as administered in England at the commencement of this Enactment' this argument fails since there is now in Bankruptcy no such common law priority for Crown debts.

Order accordingly.

[REVISIONAL CRIMINAL JURISDICTION]

RAJA MUSA, Ag. J.

December 21, 1938.

THE STATE OF NEGRI SEMBILAN.

v.

SALLEH BIN ABU.

[NEGRI SEMBILAN MISCELLANEOUS CRIMINAL APPLICATION No. 5 of 1938]

Road Traffic Enactment, 1937, S. 34.—Effect of.

The provisions of Section 34 of the Road Traffic Enactment, 1937, as to notice of intended prosecution apply only to those cases where proceedings are instituted by Summons and not to proceedings where an accused person has been arrested under Section 32 of the Enactment and produced and charged immediately after arrest.

CRIMINAL REVISION.

J. F. Draper, Deputy Public Prosecutor, for the State.

Cur. adv. Vult.

RAJA MUSA, AG. J.—In this case the accused was the driver of a motor lorry which became involved in a serious accident with another motor lorry on the 14th September 1938. The accused was arrested on the same day and